DCI/IC 76-3704

19 MAY 1976

MEMORANDUM FOR: Director of Central Intelligence

FROM : Daniel J. Murphy
Vice Admiral, USN
Deputy to the DCI for the Intelligence Community

SUBJECT : Proposed DCID No. 1/--, "Nondisclosure Agreements for Intelligence Sources or Methods Information"

1. Attached to this memorandum (Tab A) is a proposed DCID for the implementation of Executive Order 11905, Section 7(a), requiring nondisclosure agreements for intelligence sources or methods information. This Executive Order requires that this section be implemented by 18 May 1976.

2. The Security Committee reached a consensus on the minimum requirements for this secrecy agreement, but could not agree to the scope of material to be covered by such an agreement.

3. Originally, the DIA did not support this proposed DCID, but would withdraw their non-concurrence if the word "classified" were inserted before the phrase "information containing sources or methods of intelligence." The military services support the DIA position. The Acting Director of DIA in his position paper (Tab B) stated that DoD had no unclassified sources and methods which require protection by means of a secrecy agreement.

4. The CIA position (Tab C), supported by NSA, State and the FBI, did not purport to state nor imply the existence of unclassified information containing sources or methods of intelligence, but wished to segregate the concepts of classification and sources and methods protection. This would preserve alternate

mechanisms for accomplishing the protection requirement, viz. the classification process and the statutory provisions of the National Security Act and the CIA Act. Further, the CIA position preserved the ability for arguing these means of protection independently.

5. Neither of these two Acts, in citing the DCI responsibility for protecting intelligence sources or methods from unauthorized disclosure, specifies that sources and methods information need be classified in order to warrant protection. Neither Section 3 nor Section 7 of Executive Order 11905 specifies that only classified sources and methods need protection. The wording of the Executive Order follows the pattern of the earlier statutes in omitting reference to the classification or classifiability of the information.

6. CIA/Office of General Counsel representatives discussed the CIA and DIA positions with Justice Department representatives who agreed with the propriety of the CIA position provided that it is understood that a secrecy agreement which does not cover only classified information would not be enforceable by means of prior restraint. Consequently, the Justice representative advised that DoD's objection might be met if a separate agreement were drafted which could cover sources and methods information without reference to classification. It is CIA's belief, and the Justice representative concurred, that such agreement is necessary to provide a basis for administrative action against an employee in the case of unauthorized disclosure of sources and methods information.

7. Mr. Mason Cargill and Mr. Tim Hardy of the White House staff also agreed with CIA's position and discussed it with Mr. Robert Andrews, Special Assistant to the General Counsel, DoD. Mr. Andrews subsequently advised the White House and [redacted] Acting STAT General Counsel, CIA, that he found the proposal as outlined in paragraph 6 acceptable.

8. The current draft of the proposed DCID will accommodate the one-agreement system CIA proposes and the two-agreement system favored by DoD.

9. With your approval, the attached draft DCID will be sent to NFIB members for vote sheet action.

[redacted] STAT

Daniel J. Murphy

Attachments (3)

APPROVED:

George Bush

May 25 '76
Date

Next 3 Page(s) In Document Exempt

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DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20301

9 APR 1976

U-52,300/DS-6

MEMORANDUM FOR THE CHAIRMAN, UNITED STATES INTELLIGENCE BOARD

SUBJECT: Secrecy Agreements for Intelligence Sources and Methods

1. I have watched with interest the efforts of the United States Intelligence Board Security Committee (USIB SECOM) working group to produce a Director of Central Intelligence Directive (DCID) which will satisfy the Director of Central Intelligence's (DCI's) responsibility under Section 7.a. of Executive Order 11905. A consensus appears to have been reached as to minimum requirements for the secrecy agreement, but a serious problem has arisen as to the scope of the material to be encompassed by the agreement.

2. The Central Intelligence Agency (CIA) membership is pressing for the inclusion in the agreement of both classified and unclassified intelligence information containing sources and methods. DIA cannot support or endorse any secrecy agreement which purports to restrict a DoD employee's use of unclassified information. A number of cogent reasons necessitate this position.

3. The secrecy agreement is intended to serve one basic purpose - protection of intelligence sources and methods by three means:

a. A psychological deterrent.

b. Provide a contractual basis for prepublication judicial restraint.

c. Administrative and disciplinary action against violators of the agreement.

Each of the methods contains sub silentio certain inherent requirements in order to be successful. In addition, administrative convenience recommends the use of a single piece of paper which would include all aspects of an agency's secrecy agreement.

4. For a psychological deterrent to be effective, it must be creditable, logical and reasonable. Prior judicial restraint as enunciated in the leading case (U.S. v. Marchetti) requires a contractual relationship containing consideration and which, for constitutional reasons, is limited to classified material. Adverse administrative action or disciplinary action against a government employee must be reasonable and is subject to certain administrative due process requirements. In this

regard it must not be forgotten that only a minority of the Executive Branch employees fall within the excepted service category or are in some fashion exempt from the protection afforded by the Constitution, civil service or military regulations from arbitrary and capricious agency action including termination of employment.

5. While neither your statutory responsibility to protect intelligence sources and methods nor Executive Order 11905 speak specifically of "classified" sources and methods only, it is believed that this is clearly implied. The need for protection of sources and methods is founded on their relationship with national defense and foreign relations. This is the criteria for classification of information established by the President in Executive Order 11652. A strong argument can be made that Executive Order 11652 is the exclusive means available for the protection of information of this type. Any attempt to protect unclassified sources and methods by means of a secrecy agreement could be considered as second classification system which would of course be contrary to the prohibition contained in Executive Order 11652. In view of the Fourth Circuit U.S. Court of Appeals holding in U.S. v. Marchetti, it is believed that any effort on the part of the government to seek a prepublication restraining order of unclassified sources and methods would be doomed to failure from the outset.

6. When Executive Order 11905 is viewed in the context of the remarks made at the White House press conference by Mr. Marsh at the time the Executive Order was made public, the intent of Section 7.a. appears to be simply to insure that secrecy agreements would be used throughout the Executive Branch and nothing more. A review of Attorney General Levi's remarks on the same occasion with regard to the accompanying White House sponsored legislation suggests that the purpose of the legislation was to provide a punitive sanction to run concurrently and coextensively with the civil remedy which would be available as a result of the Section 7.a. agreement. The legislation specifically refers to "properly classified and designated" intelligence sources and methods. We can find no indicia of Presidential intention to introduce any novel concepts or to deviate from the generally recognized, accepted and understood practices and procedures for the safegurading of information "which bears directly on the effectiveness of our national defense and the conduct of our foreign relations."

7. From the purely practical point of view:

a. DoD has no unclassified sources and methods which require protection by means of a secrecy agreement.

b. DoD could not in good conscience justify protection of unclassified sources and methods in the federal courts.

c. The imposition of such a requirement by DCI would prove highly embarrassing to the Department in that it has neither the personnel rules and regulations nor the procedures for supporting the full implication of the requirement, nor does it feel that they could be obtained.

d. Should an occasion present itself when the Department was forced to act on such a basis, it would be subjected to public, press and Congressional and probably judicial criticism that it would just as soon avoid.

e. The imposition at this time of requirements which would not be enforceable throughout the Executive Branch could only serve to further degrade the credibility of our security system.

8. Finally, the DoD General Counsel concurs with me and my General Counsel in the belief that Section 7.a. of Executive Order 11905 requires only the publication of a DCID which will prescribe minimum standards for a secrecy agreement. Agencies and departments of the Executive Branch would be free to impose such additional requirements as might be needed by individual situations. Since there is unanimity of opinion that Executive Order 11905 did anticipate the protection of classified sources and methods, the impending deadline and the novelty of the CIA position, it is recommended that the DCID be limited in scope to classified sources and methods and the breaking of new ground be saved for a later date.

E. F. [illegible], JR.
Lieutenant General, USAF
Acting Director

6 MAY 1976

MEMORANDUM FOR: Chairman, Security Committee, United States Intelligence Board

SUBJECT : Nondisclosure Agreement for Intelligence Sources and Methods Information

1. The ad hoc working group of the Security Committee established by you to address the implementation of Section 7(a) of Executive Order 11905 has developed a draft Director Central Intelligence Directive as an instrument of implementation for the section of the Executive Order cited. The draft DCID No. 1/XX, "Nondisclosure Agreements for Intelligence Sources or Methods Information," a copy of which is attached, is endorsed by the Central Intelligence Agency; the wording of this Directive has also received the approval of the Federal Bureau of Investigation, National Security Agency, Department of State working group representatives. The Defense Intelligence Agency speaking for itself and the Services Intelligence components does not concur in one aspect of the proposed Directive.

2. The DIA position takes exception to the application of the document to "information containing sources or methods of intelligence" and wants the requirements of the proposed Directive to apply only to such information when it is classified under Executive Order 11652. It is understood that DIA would withdraw its nonconcurrence of the Directive if the word "classified" were inserted before the phrase "information containing sources or methods of intelligence," when this phrase occurs in the draft DCID.

3. The CIA position supported by other agencies identified above does not purport to state nor imply the existence of unclassified information containing sources or methods of intelligence, but for reasons outlined below in this memo wishes to segregate the

concepts of classification and sources and methods protection. Simply stated it identifies the object of protection as "information containing sources or methods of intelligence" and wishes to preserve alternate mechanisms for accomplishing the protection requirement, viz. the classification process and the statutory provisions of the National Security Act and the Central Intelligence Agency Act. Further, the CIA position on the proposed DCID wishes to preserve the ability for arguing these means of protection independently.

4. Neither the National Security Act of 1947 nor the Central Intelligence Agency Act of 1949 in citing the DCI responsibility for protecting intelligence sources or methods from unauthorized disclosure specifies that sources and methods information need be classified in order to warrant protection. In the opinion of counsel it is clear that this omission was not an oversight; these statutory provisions were clearly intended to provide an independent means to protect sources or methods separate from the otherwise available protection for classified information.

5. Executive Order 11905 in Section 3 directs the DCI to insure that appropriate programs are developed for the protection of intelligence sources and methods and in Section 7 addresses the protection of intelligence sources and methods from unauthorized disclosure. In neither section does the Executive Order specify that only classified sources and methods need protection. The wording of the Executive Order follows the pattern of the earlier statutes, viz. omitting reference to the classification or classifiability of the information. Separation of the concepts of classification and sources and methods protection on the basis of the Director's responsibility is important in order to support further development of the concept of the Director's responsibility and ability to execute this responsibility. It is essential that the Intelligence Community understand that the concept of source protection is not unique to the Community nor to foreign intelligence operations. It is axiomatic that police organizations and journalists can and do protect their sources from disclosure without benefit of the classification system and Executive Order 11652. The right to protect such police and journalist sources is supported in the law and has withstood repeated challenges. There are other numerous nondisclosure statutes

currently in existence covering income tax returns, harvest statistics, etc.

6. The Director's statutory responsibility (50 U.S.C. 403(d)(3) and 50 U.S.C. 403g) as nondisclosure statutes has now withstood court challenge in four separate cases in all of which the courts ruled that these provisions are nondisclosure statutes under the Freedom of Information Act. In none of these cases did the court determine that the information withheld must be also classified in order to qualify for the sources and methods withholding authority.

7. Under the Freedom of Information Act the burden of proof for classification rests with the government. Thus, it is incumbent upon the government to prove to the satisfaction of federal courts not only that the procedures under Executive Order 11652 have been followed, but also that the information contained in a document for which classification is claimed is indeed "classifiable" within the criteria set forth in the Executive Order.

8. The Central Intelligence Agency's position on the proposed DCID recognizes that "classifiability" pursuant to the criteria of the Executive Order is a judgement call, at times open to debate, especially by individuals not familiar with this judgement process. Executive Order 11652 recognizes this fact by its demand that classifying authority be severely limited. The CIA position would suggest that where possible we avoid the requirement of allowing a court to review this judgement when intelligence sources and methods are involved. Without suggesting any incompetence on the part of the court, we suggest that it is a great deal more difficult to prove classification than to prove that information contains intelligence sources or methods.

9. Thus, while sources and methods information requiring protection may in every case be classified, we believe it infinitely preferable to have a mechanism whereby such information can be protected to the satisfaction of the courts without having to bear the onerous burden of proving classifiability. This is partially desirable because it is often very difficult to develop an argument without convoluted logic that the disclosure of the identity

of one intelligence source or method will do damage to the national security under the criteria set forth in Executive Order 11652. The difficulty in developing such an argument at times is compounded by the Executive Order's insistence that when in doubt the lower classification or no classification option shall prevail.

STAT

Robert W. Gambino
CIA Member, USIB
Security Committee

Att.

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